IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22173 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **-Yes.**

2 To be referred to the Reporter or not ? **-Yes.**

3 Whether their Lordships wish to see the fair copy of the judgment ? **-No.**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **-No.**

5 Whether it is to be circulated to the civil judge ? **-No.**

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MAHEBUBBHAI @ SENIOR CHHOTUBEGMOGAL - Petitioner(s)

Versus

COMMISSIONER OF POLICE & 2 - Respondent(s)

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Appearance :
MR ANIL S DAVE for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2.
GOVERNMENT PLEADER for Respondent(s) : 2 - 3.
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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 18/01/2006

ORAL JUDGMENT

1.Mahebubbhai @ Senior Chhotubeg Mogal (detenu), at present in Jamnagar Jail has filed this habeas corpus petition through his brother in law – Johar Mahebubbhai

Sheikh, petitioner, under Article 226 of the Constitution of India challenging the order of detention dated 13/10/2005 passed by the Police Commissioner, Ahmedabad under the provisions of PASA Act. Petition was filed on 25/10/2005. On 15/11/2005, this Court (Coram:K.M.Mehta, J.) has issued rule which was returnable on 12/12/2005. On behalf of respondent, Mr.L.R.Pujari, learned APP appears. He has filed affidavit in this behalf. Therefore, with consent of parties, matter has been reached for hearing and final disposal to this Court.

2.Mr.Anil S.Dave, learned advocate for the petitioner has invited my attention to the detention order dated 13/10/2005 passed by the detaining authority under the provisions of PASA Act. The learned advocate has also invited my attention to the order of committal dated 13/10/2005 by which the detenu has been sent to Jamnagar jail in this behalf. The learned counsel has also invited my attention to the grounds supplied by the detaining authority dated 13/10/2005. From the grounds, it revels that detenu has committed two offences which are as under:

1. Detenu has committed offence under jurisdiction of Danilimda Police Station in connection with Criminal Case No.117 of 2005 dated 14/7/2005 under the provisions of Section 307 which provides attempt to murder ans Section 120(B) of IPC and Section 25(1)(B)(A) of the Arms Act. Investigation is still going on at the relevant time.

2. Detenu has committed offence under jurisdiction of Kalupur Police Station in connection with Criminal Case No.143 of 2005 dated 29/9/2005 under the provisions of Section 387, 323, 294(B), 506(1), 427 and 114 of IPC and Section 135 of Bombay Prohibition Act. Investigation is still going on at the relevant time.

3. It was also stated that authority has considered the fact that the detenu is keeping dangerous weapons with him and also indulging into anti-social activities and therefore he is a 'dangerous person' within the meaning of Section 2(c) of the PASA Act. The authority has narrated the facts in this behalf.

4. However, for the present purpose, the learned advocate has submitted that as regards first offence, detenu has

already been granted bail. For second offence, he was granted remand and therefore he was in police custody. Even the authority has stated that the detenu was in police remand. However, the authority has further observed that as soon as the period of remand is over, the police authority will produce the detenu in jail before the Court and thereafter, the detenu can file bail application and he may be released from the jail if the bail application granted. After detenu released from the jail he may again indulging into anti social activities and therefore, detenu should be detained in jail in this behalf.

5. The learned advocate for the petitioner submitted that so far as present petitioner concerned, he is challenging the detention of detenu only on the ground that when the authority has observed this, the authority has not properly applied its mind. He has stated that as regards second case concerned, petitioner has stated that second offence was registered with Kalupur Police Station vide Cr.No.143 of 2005 wherein the detenu was arrested on 10/10/2005 where as the order of detention was passed on 13/10/2005. The detenu did not prefer any bail

application before the competent Court at the time of passing order of detention but the detenu was on police remand. In view of the same, the observations made by the authority that the detenu is on remand and he may prefer bail application after completion of the remand period and may be released on bail by the competent Court simply for arriving at the subjective satisfaction is bad in law. It is submitted that it is the case of the detenu that detenu had not preferred any bail application before the competent Court and therefore, thee was no cogent and reliable material before the detaining authority for arriving at subjective satisfaction.

5.1) The learned advocate has submitted that the said observation is nothing but based on presumption and assumption and it is an ipsi dipsi of an officer. In absence of any cogent, credible and convincing evidence with regard to apprehension of the detaining authority about detenu's likelihood of moving an application for bail by the competent Court, the detenu may again continue his illegal activities in the areas mentioned above. The subjective satisfaction arrived at by the detaining authority is vitiated and therefore, the

order of detention is illegal, bad in law and the same is required to be quashed and set aside.

6.On the other hand, Mr.L.R.Pujari, learned APP appears for respondent. He has tried to support the order of detention on the basis of grounds stated in the order of detention. The authority has filed affidavit of Mr.K.R.Kaushik. The learned APP has relied upon the said affidavit. In the affidavit, it is stated that it is clear that the case of detenu falls within the definition of 'dangerous person' as defined under Section 2(c) of the PASA Act.

7.In support of the same, the learned advocate has relied upon following judgments in this behalf:

1. The learned advocate has also relied upon judgment of the Hon'ble Supreme Court (Constitution Bench) in the case of Rameshwar Shaw v. District Magistrate, Burdwan and another, reported in AIR 1964 SC 334 particularly para 12 in which the Hon'ble Supreme Court has observed as under:

> “As abstract proposition of law, there may not be any doubt that S.3(1)(a) does not preclude the

authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail.....”

The Hon'ble Supreme Court further observed in para 12 as under:

“On the other hand, if a person who is undergoing imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. The antecedent history and the past conduct on which the order of detention would be based would, in such a case, be proximate in point of time and would have a rational connection with the

conclusion drawn by the authority that the detention of the person after his release is necessary. It may not be easy to discover such rational connection between the antecedent history of the person who has been sentenced to the years' rigorous imprisonment and the view that his detention should be ordered after he is released after running the whole of his sentence. Therefore, we are satisfied that the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have be determined in the circumstances of each case."

2. The learned advocate has also relied upon judgment of the Hon'ble Supreme Court in the case of Dr.Ramakrishna Rawat v. District Magistrate, Jabalpur and another, reported in AIR 1975 SC 90 particularly para 11 in which the Hon'ble Supreme Court has observed as under:

"In the case in hand, as already noticed, the petitioner was in jail custody in proceedings under Section 151, Criminal P.C. That custody was obviously of a short duration. The mere service of

the detention order on the petitioner in jail would not therefore invalidate the order. On the basis of the antecedent activities of the petitioner in the proximate past, the detaining authority could reasonably reach its subjective satisfaction about his tendency or inclination to act in a manner prejudicial to the maintenance of public order, after his release on the termination of the security proceedings under the Code."

3. He has relied upon Judgment in the case of Vijay Narain Singh v. State of Bihar and others, reported in 1984 (3) SCC 14, particularly para 32 at page 35 in which the Hon'ble Supreme Court has observed as under:

"It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardised unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it

may not be possible to resist the issue of orders of bail, unless the material available is such as would satisfy the requirements of the legal provisions authorising such detention."

4. He has relied upon Judgment in the case of Ramesh Yadav v. District Magistrate, Etah and others, reported in 1985 (4) SCC 232, particularly para 6 at page 235 in which the Hon'ble Court has observed as under:

"On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to e opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed."

5. He has relied upon Judgment in the case of Binod Singh v. District Magistrate, Dhanbad, Bihar and others, reported in AIR 1986 SC 2090 particularly para 6 and 7 at page 2093 for which in para 6 and 7, the Hon'ble Apex Court has observed as under:

> “Para -6 In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the fact and circumstances of this case, therefore, the continued detention of the detenu under the Act is not justified.”

In para 7 of the said judgment, the Hon'ble Court has observed as under:

> “If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised.”

6. I also refer to an rely upon the Judgment in the case of Kumarunnissa v. Union of India and another reported in 1991 (1) SCC 128 particularly para 11 at page 138, in which the Hon'ble Apex Court has observed as under:

> “The decisions of this Court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty. We will now consider the case law in brief.”

7. I also refer to and rely upon the Judgment in the case of Ravadeneyta Ricardo Agustin v. Government of the National Capital Territory of Delhi and others reported in 1994 (1) SCC 597 particularly para 8 at page 600 in which the Hon'ble Court has observed as under:

> “The above statement merely speaks of a “possibility” of the detenu's release in case he

moves a bail petition. It neither says that such release was likely or that it was imminent. Evidently, the statement fall short of the requirement enunciated by this Court in Kamarunnissa. Even in the return filed in this petition, the authority has not stated (in response to Ground'B' of the writ petition) that there was material before him upon which he was satisfied that the petitioner was likely to be released or that such release was imminent.”

8. I also refer to and rely upon the Judgment in the case of Amritlal and other v. Union Government through Secretary, Ministry of Finance and others reported in AIR 2000 SC 3675 particularly para 7 at page 3677 in which the Hon'ble Court has observed as under:

“The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.”

After relying upon above para 7 at page 3677, the Hon'ble Supreme Court has explained word 'likelihood of petitioner' and states that Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order. The said aspect has not been considered properly.

9. I also refer to and rely upon the Judgment in the case of Naresh alias Lalo Babubhai v. State of Gujarat and others reported in 1 GLH 2002 528 particularly para 8 at page 533 in which my brother Mr. Justice H.K.Rathod has observed as under:

> “There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority, subjective satisfaction is not established, looking to the facts of the present case.”

8. On the other hand, Mr.L.R.Pujari, learned APP has relied upon the judgment of the Hon'ble Supreme Court in the case of Union of India v. Paul Manickam and another, reported in AIR 2003 SC 4622, particularly para 12 at page 4627 in which the Hon'ble Court has observed as under:

> “So far as this question relating to procedure to be adopted in case the detenue is already in custody is concerned, the matter has been dealt with in several cases. Where detention orders are passed in relation to persons who are already in Jail under some other laws, the detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody the detenue by itself does not invalidate an order his preventive detention, and decision in this regard must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenue from acting in any manner prejudicial to

the security of the State or to the maintenance of public order or economic stability, etc. ordinarily, it is not needed when detenue is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenue and take that factor into account while making the order. If the detaining authority is reasonably satisfied on cogent materials that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging such, prejudicial activities the detention order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenue was likely to be released on bail, the order would be vitiated. (See N.Meera Rani v. Govt. of Tamil Nadu, (AIR 1989 SC 2027); Dharmendra Suganchand v. Union India, AIR 1990 SC 1196). The point was gone into detail in Kamarunnissa v. Union of India (AIR 1991 SC 1640). The principles were set out as follows. Even in the case of a person in custody, a detention order can be validly passed, (1) If the authority passing the order is

aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him; (a) that there is a real possibility of his release on bail, and (b) that on being released, he would in all probability indulge in prejudicial activities, and (3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid. In the case at hand the order of detention and grounds of detention show awareness of custody and/or possibility of release on bail."

9.I have considered the Constitution Bench judgment of the Hon'ble Apex Court in the case of Rameshwar Shaw (supra), judgment of the Hon'ble Apex Court in the case of Dr.Ramakrishna Rawat (supra), Vijay Narin Singh (supra), Ramesh Yadav (supra), Binod Singh (supra), Kamarunnissa (supra), Ravadeneyta Ricardo Agustin (supra) and Amrutlal and other (supra). I have also referred to the latest judgment of the Hon'ble Apex Court in the case of Paul Manickam and another (supra) where the Hon'ble Apex Court has laid down the

principles in this behalf.

10.All these above decisions relate to the principle under-lying passing of detention order when man is in jail. As per the Constitution Bench judgment of Rameshwar Shaw (supra), following position emerges: 1) if a person who is undergoing imprisonment, for a very short period, say for a month or two or so, and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether the detention of the said person would be necessary after he is released from jail, and if the authority is bona fide satisfied that such detention is necessary, he can make a valid order of detention a few days before the person is likely to be released. 2) The antecedent history and the past conduct on which the order of detention would be based would, in such case, be proximate in point of time and would have a rational connection with the conclusion drawn by the authority that the detention of the person after his release is necessary. As per judgment in the case of Dr.Rashmikrishna Rawat (supra), on the basis of antecedent activities of the petitioner in the

proximate past, the detaining authority could reasonably reach its subjective satisfaction about his tendency or inclination to act in a manner prejudicial to the maintenance of public order, after his release on the termination of the security proceedings under the Code. As per the judgment in the case of Kamarunnissa (supra), the detaining authority is alleging fact that detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty. As regards case of Amrutlal and other (supra), the detaining authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Cogent material is likelihood of having a bail application moved in the matter but not obtaining a bail order.

11.In view of decision in the case of Paul Manickam, consideration is that even in a case of person in custody, a detention order can be validly passed, 1) If the authority passing the order is aware of the fact that he is actually in custody, 2) if he has reason to believe on the basis of reliable material placed before

him, a) that there is a real possibility of his release on bail and b) that on being released, he would in all probability indulge in prejudicial activities, and 3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would be valid.

12.I have therefore, set out the grounds of detention, detention of the detenu, affidavit in reply by the authority in this behalf. It is no doubt true that authority was aware that petitioner was in custody but the observation of the authority that he will file bail application and if released on bail, thereafter committed offences. From the facts and circumstanced of the case, it appears that the detenu was detained and in jail on 10/10/2005 and the order of detention was passed on 13/10/2005. In between petitioner has not filed any bail application.

13.In view of the principles which I have considered above and in view of the facts and circumstances of the case, in this case, the petitioner was in jail on 10/102/005 and the order of detention is passed on 13/10/2005. Meanwhile he has not filed any bail

application so, the apprehension expressed by the authority is based on no material whatsoever. Once the bail application is not filed, there is no question of possibility of release on bail of the petitioner and therefore, the apprehension of the authority which has been expressed in the order is contrary to and inconsistent with the records of the case and also contrary and inconsistent with the principles laid down by the Hon'ble Supreme Court in the case of Paul Manikam (supra) and therefore, the order cannot be passed. In view of the same, the authority has passed an order of detention without any credible and cogent material. Therefore, the order of detention passed by the authority is required to be quashed and set aside.

14. In the result, petition is allowed. I hereby quash and set aside the order of detention. Mahebubbhai @ Senior Chhotubeg Mogal, detenu is ordered to be set at liberty forthwith if he is not required in connection with any other case. Rule is made absolute accordingly with no order as to cost. Direct service is permitted.

(K.M.MEHTA, J.)

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